No. 79-1252 and 79-1502

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA, et al.,
Petitioners,

v.

SIERRA CLUB, et al.,
Respondents,

and

KERN COUNTY WATER AGENCY, et al.,
Petitioners,

v.

SIERRA CLUB, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICI CURIAE OF PUBLIC WATER AGENCIES IN SUPPORT OF RESPONDENTS SIERRA CLUB, ET AL.

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QUESTIONS PRESENTED

1. Whether the Rivers and Harbors Act of 1899 includes an implied right of action enabling private parties to seek civil enforcement of Section 10 of the Act.

2. Whether Section 10 of the Rivers and Harbors Act of 1899 applies to a water export project that diverts water from a navigable waterway and the diversions thereby diminish the navigable capacity of the channel or where the diversion alters or modifies the course, location, condition or capacity of the channel.

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Now come Contra Costa County Water Agency, San Joaquin County Flood Control and Water Conservation District, Central Delta Water Agency and South Delta Water Agency, public water agencies created under the laws of the State of California,

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(collectively referred to herein as "*Amici*") and they hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of the attorneys for the respondent Sierra Club, et al., has been obtained. The consent of the Solicitor General of the United States has been obtained (on behalf of the federal respondents). The consent of the attorneys for the petitioner State of California was sought and consent was refused. The consent of the attorney for the petitioner Tulare Lake Basin Water Storage District has been obtained. The consent of the attorneys for petitioners Kern County Water Agency, Metropolitan Water District of Southern California and the Santa Clara Valley Water District was sought and consent was refused.

The interest of these *Amici* arises from the fact that each are public water agencies situated in the Sacramento-San Jaoquin Delta (in the counties of Contra Costa and San Joaquin). One of the principal purposes of these *Amici* is to do everything possible to preserve and protect the water resources in the Delta and all of the beneficial uses of the water therein. The issues in the instant proceedings involving the matter of diversions of water out of the Delta by the State and federal water export projects (State Water Project and federal Central Valley Project) directly affect the interests of these *Amici* (and the lands and water rights encompassed thereby).

Amici are presently parties to eleven (11) lawsuits pending in the State and federal courts of California. The lawsuits involve, both directly and indirectly, the operations of the State and federal water projects. One of said lawsuits is the case of *U.S. v. California* which was recently remanded by this Honorable Court to the U.S. District Court after this Court's decision in *California v. U.S.*, 438 U.S. 645 (1978). The holding in and scope of that decision are critical in the evaluation of the position and arguments raised by petitioners herein. *Amici* disagree with said position of petitioners herein principally based upon said decision in *California v. U.S.* For this additional reason, *Amici* are vitally interested in the legal issues raised in said proceedin[illegible].

Petitioners have taken the position that the State of California should exercise complete control of the navigable waterways in the Delta. They argue that where water diversions authorized under California law are involved, no permit from the Corps of Engineers under Sections 9 and 10 of the Rivers and Harbors Act of 1899 is necessary. We disagree. We desire to present to the Court some legal and factual considerations not presented by other parties in the instant proceedings in and by the attached brief of *Amici Curiae*.

Respectfully submitted,

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TABLE OF CONTENTS

Page

Questions Presented i

Motion for Leave To File Brief Amici Curiae of Public Water Agencies in Support of Respondents Sierra Club, Et Al. iii

Table of Authorities ix

Brief Amici Curiae of Public Water Agencies in Support of Respondents Sierra Club, Et Al. 1

Summary of Argument 1

Statement of Facts of Instant Case and Interest of Amici Curiae Herein 4

The Bay-Delta Estuarine System 4

Need for "Salinity Control" in The Estuarine System 6

The Delta "Export Projects" 7

The Peripheral Canal Project 8

Salient Facts Re These Amici Curiae 10

Delta Protection Act (DPA) 11

State Water Resources Control Board (SWRCB) and Its D-1485 12

Water Right Status of State in Connection with the State Water Project 13

Argument:

I- The Army Corps of Engineers Has Full Jurisdiction Under the Rivers and Harbors Act of 1899 Over Said "Export Diversions" (SWP) 15

PREVIOUS PAGE WAS BLANK

Page

A. Settled Legal Principles 15

B. Application of Said Settled Principles to Instant Case 16

1. The Rivers and Harbors Act Does Not Exempt Water Export Projects (e.g., SWP and CVP) from the Corps' Permit Jurisdiction under Sections 9 and 10 18

2. Neither *California v. US* nor *U.S. v. New Mexico* Support An Exemption Of Water Export Projects 18

3. The Corps Does Not Attempt To "Allocate" Water When Exercising Its Powers to Protect the Public Interest in the Condition and Quality of Navigable Waters 21

II- The Ruling of the District Court Below With Respect to the Principal Canal Project Should Not Be Disturbed or Clouded By a Decision Herein 23

Conclusion 27

TABLE OF AUTHORITIES CITED

Cases **Page**

California v United States, 438 US 645, 57 L ed 2d 1018 (1978) 2, 18, 19, 20

Gibbons v. Ogden, 22 US (9 Wheat) 1, 6 L Ed 23 (1824) 15

Gilman v. Philadelphia, 70 US (3 Wall) 713, 18 L Ed 96 (1865) 15

Ivanhoe Irrigation District v. McCracken, 357 US 275, 2 L ed 2d 1313 (1958) 7

Kaiser Aetna v. United States, 62 L ed 2d 332, 100 S Ct 383 (1979) 16

Santa Margarita Mutual Water Company v. State Water Rights Board, 165 F Supp 980, (SD Cal., 1958) 12

United States v. Appalachian Electric Power Co., 311 US 377, 85 L Ed 243 (1940) 16

United States v. New Mexico, 438 US 696, 57 L ed 2d 1052 (1978) 2, 18, 19

United States v. Rio Grande Dam & Irrigation Co., 174 US 690, 43 L Ed 1136 (1899) 19

Wyandotte Transportation Co. v. United States, 389 US 191, 19 L ed 2d 407 (1967) 15

Zabel v. Tabb, 430 F2d 199 (5th Cir. 1970) 16

UNITED STATES CONSTITUTION, CODES AND STATUTES

U.S. Constitution, Article I, Section 8 15

Clean Water Act, 33 USC §§ 1251-1376 ..... 3, 22

Rivers and Harbors Act of 1899, 30 Stat. 1151, (33 USC 401 and 403) ..... *in passim*

Page

CONGRESSIONAL

118 Cong. Record 16894 (1972) 22, 23

CALIFORNIA CODES AND STATUTES

Calif. Water Code
§ 175 12
§ 1202 ..... 14, 21

§§ 12200-12205 ..... 3, 11, 15

Stats 1957, Chapter 518 (Contra Costa County Water Agency Act) 10, 11

Stats 1956, Chapter 46 (San Joaquin County Flood Control and Water Conservation District Act) 10

Stats 1973, Chapter 1133 (Central Delta Water Agency Act) 10, 11

Stats 1973, Chapter 1089 (South Delta Water Agency Act) 10

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State Department of Water Resources, *Bulletin 76* (July, 1978) 4, 5, 9

State Department of Water Resources, *Bulletin 141* (November, 1965) 14

State Water Resources Control Board, Decision 1485 (August, 1978) 12, 13

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BRIEF AMICI CURIAE OF PUBLIC WATER AGENCIES IN SUPPORT OF RESPONDENTS SIERRA CLUB, ET AL.

SUMMARY OF ARGUMENT

These *Amici Curiae* (each of which is a public water agency created by a separate statute enacted by the California Legislature), with the principal purpose of preserving and protecting the many thousands of vested water rights in and the irreplaceable water resources (i.e., waters used for domestic,

agricultural, industrial and environmental uses) of the great and vast Sacramento-San Joaquin Delta from being degraded and lost by the intrusion (by daily tidal action) of ruinous salt water from San Francisco Bay and the Pacific Ocean, contend herein:

I

There can be no serious dispute as to the full jurisdiction of the Army Corps of Engineers over the many navigable waterways (i.e., in excess of 550 miles) in the Delta and of any diversion of water therefrom by the State Water Project (SWP) by its Delta Pumping Plant in the southeastern corner of the Delta which water is thus exported to the Southern San Joaquin Valley and to Southern California.

II

The *State's* plea herein that it be allowed to control and regulate all such "export diversions" without any interference by or from the Corps of Engineers is fundamentally fallacious and unsound because it is based upon case authorities not in point and which are clearly distinguishable. This is particularly true of its principal reliance upon the recent decisions of this Court in *California v. U.S.*, 438 U.S. 645 (1978) and *U.S. v. New Mexico*, 438 U.S. 696 (1978).

III

These "export diversions" presently cause and will continue to cause drastic reductions in Delta Outflows (i.e., flows of fresh river water from the Sacramento and San Joaquin Rivers into and through the Delta and the lower (westerly) portion of the Bay-Delta Estuarine System), with a consequent severe and destructive intrusion of salt water into the Delta. These Delta Outflows are the only feasible means of repelling and controlling the ever present daily menace of such destructive saline intrusions.

IV

The *State* and its Department of Water Resources (DWR) have a basic conflict of interest vis-a-vis the Delta in connection with its said "export diversions" because, on the one hand, the

State is obligated under the *Delta Protection Act* (Water Code Sections 12200-12205) to provide ample Delta Outflows to adequately repulse and control said salinity intrusions while, on the other hand, to export to the South as much water as it can in an attempt to fulfill its water contracts with these Southern interests and its rich and powerful allies in this litigation (e.g., Metropolitan Water District of Southern California, Kern County Water Agency, et al). Because of this basic conflict, these *Amici* and the thousands of landowners and water users they represent urgently need the aid and protection which the Corps of Engineers can provide pursuant to its admitted jurisdiction herein over the Bay-Delta Estuarine System.

V

It is misleading, if not improper, to describe or characterize the Corps' actions taken under the Rivers and Harbors Act as an attempt to "allocate" water between water right owners (as the *State* attempts to do herein). The Corps, in processing an application for a permit under Sections 9 and 10, only determines what activities in navigable waters must be prohibited or limited in order to protect the paramount federal interest in the condition and quality of navigable waterways.

VI

The salinity intrusions into the Delta caused by these huge water diversions of the SWP constitute "pollution" under federal law (i.e., Clean Water Act, 33 U.S.C. §§ 1251-1376).

VII

The Peripheral Canal Project (proposed to be constructed by the *State* for its SWP) will admittedly cause a closure, modification or temporary modification of navigable water channels in the Delta which is another basis for Corps jurisdiction over the "export diversions" of the *State* and its SWP.

The scope and full significance of these contentions of *Amici* thus summarily stated will become more apparent from the following Statement of Facts which *Amici* will now present.

STATEMENT OF FACTS OF INSTANT CASE AND INTEREST OF AMICI CURIAE HEREIN

The legal issues on this appeal are of great importance to the preservation and protection of San Francisco Bay and the Sacramento-San Joaquin Delta upstream therefrom (hereinafter: Bay-Delta Estuarine System).[1] All of the multitude of important water rights, water needs and beneficial uses of water within the Bay-Delta Estuarine System (e.g., domestic, industrial, agricultural, recreational and environmental uses and needs) will be impacted by the decision herein. To understand the significance of this case and the interest of these *Amici* herein, we shall briefly set forth several salient facts.

The Bay-Delta Estuarine System[2]

One physical component of this System is San Francisco Bay. The Bay comprises the largest estuary along the 1,000-mile coastline of California. More than 4,000,000 people reside in the metropolitan San Francisco Bay Area. Many of them use the water of the Bay for recreation, commerce and aesthetic enjoyment.[3]

Moving to the north and east of San Francisco Bay into San Pablo and Suisun Bays, the next principal component is the nationally recognized Suisun Marsh Wildlife Habitat. This 85,000 acre brackish water marsh represents about 13 per cent of the natural wetlands in California. The Marsh supports over 200

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[1]The parties stipulated to "undisputed facts" below which are contained in the *"Agreed Pre-Trial Order Respecting The First Phase Of Bifurcated Trial"* (dated June 10, 1974). Said "Pre-Trial Order" is set forth in the Joint Appendix filed herein by the parties. In paragraph 3.54 of said "Pre-Trial Order," the parties agreed that: "San Francisco Bay and the Delta are estuaries." (p. 97a)

[2]Some of these salient facts as to this Estuarine System are set forth in *Bulletin 76* of the State Department of Water Resources (July, 1978), an official governmental publication of the State of California. *State* has asked this Court to take judicial notice of this publication (*State Br., p. 4, fn. 2*) and a certified copy thereof has been lodged with the Clerk of this Court.

[3]See paragraph 3.20 of "Pre-Trial Order" (Joint Appendix, p. 89a).

species of birds, 36 species of mammals and 7 species of rare or endangered wildlife, as well as providing important nursery areas for striped bass and other fishes. It is a major wintering area for ducks and geese of the Pacific Flyway.

The third principal component of this Estuarine System is the Sacramento-San Joaquin Delta (hereinafter: Delta). The Delta is situated in the counties of Contra Costa, San Joaquin, Sacramento, Yolo, Solano and Alameda. It is an area of over 700,000 acres; including over a half million acres of rich farmlands which annually produce crops in excess of $300 Million. It is the site of many substantial industries (e.g., Crown-Zellerbach, Fibreboard Corporation (Louisiana Pacific), U.S. Steel, Dow Chemical) which are dependent upon adequate fresh water supplies out of the Delta's maze of river channels. The Delta is one of the most important wildlife areas of California.[4] The 700 miles of river channels in the Delta, with a navigable length in excess of 550 miles, supports vast anadromous fisheries (e.g., striped bass, salmon, steelhead, shad, sturgeon)[5] as well as other fisheries.

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[4]*Bulletin 76 (1978)* describes the importance of the Delta as a wildlife area as follows:

> "The Delta is one of the important wildlife areas of the State. Species are numerous and include ducks, geese, swans, sandhill cranes, pheasants, over 200 different species of non-game birds, 39 species of mammals, 19 species of reptiles, and eight species of amphibians. Corn and other grains left after harvesting supply millions of waterfowl with high-quality feed each winter." (p. 47.)

[5]Paragraph 3.18 of the aforementioned "Pre-Trial Order" set forth in the Joint Appendix states:

> "3.18 The Sacramento-San Joaquin Delta contains approximately 700 miles of meandering waterways some of which are navigable. Approximately 35% of California warm water and anadramous sport fishing and about 80% of the commercial salmon fishing of California are dependent upon the Delta environment. As used herein, the Sacramento-San Joaquin River Delta ('Delta') shall include all lands within those boundaries set forth in California Water Code § 12220 and depicted on State Defendants' Exhibit A." (p. 89a)

Need for "Salinity Control" in The Estuarine System

The many beneficial uses of water, both consumptive and non-consumptive, in the Bay-Delta Estuarine System are constantly being threatened by the excessive intrusion into this Estuarine System of saline water from the Pacific Ocean (due to daily tidal action). Such excessive salinity intrusion poses a real and constant threat to the survival of the Suisun Marsh. It also degrades and pollutes water quality in the Delta with serious economic impacts on agriculture and industry as well as cause public health problems in connection with the domestic use of water in the Delta.[6]

The only feasible means of controlling such excessive salinity intrusions is to repulse them by continuously maintaining adequate flows of fresh river water in the channels of the Delta which flow through the Delta and into the rest of this Estuarine System. The water flows thus provide a "hydraulic barrier" to provide "Salinity Control." Such required water flows are commonly referred to as "Delta Outflows." Such Delta Outflows can be provided by natural river runoff and by the release of waters impounded upstream of the Delta by the dams and reser-

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[6]This salinity intrusion problem is emphasized by *State* in its *State Br.* as follows:

> "A major problem of California's water supply system is that the Delta's waters are perennially threatened by the intrusion of ocean salt waters. *The intruding salt waters pose a threat to valuable economic and environmental interests in the Delta; the Delta sustains a rich agricultural economy, and is the source of unusual species of fish and waterfowl.* The intruding salt waters also threaten to degrade the quality of SWP and CVP waters exported from the Delta to the contracting water districts in central and southern California." (emphasis added) (p. 5)

voirs of the State Water Project (SWP) and the federal Central Valley Project (CVP).[7]

The Delta "Export Projects"

The federal Central Valley Project is one of two "export projects" operating in and diverting water out of the channels of the Delta. Its pumping plant, called the Tracy Pumping Plant, is

[7] *State* describes the "Salinity Control" functions of the SWP and CVP in its *State Br.* as follows:

> "An effective way to prevent such salinity intrusion is to flush out the salt waters by release of vast quantities of fresh waters from the upstream dams and reservoirs of the SWP and CVP. The more water that is used for flushing purposes, however, the less water is available for export to the contracting water districts." (p.5)

This is but one aspect of the "conflict of interest" between the *State* (as the operator of the SWP) and the water rights and water users in the Delta and other portions of this vast Estuarine System. (See page 14, *infra*)

Incidentally, this Court epitomized the purposes of the CVP (including the provision of Salinity Control in the Delta) in *Ivanhoe Irrigation District v. McCracken,* 357 US 275, 2 Led 2d 1313 (1958) as follows:

> ". . .The water supply facilities along the Sacramento River will regulate its flow, store surplus water runoff for use in the Sacramento Valley, maintain navigation in the channel, *protect the Sacramento-San Joaquin Delta from salt intrusion from the Pacific,* provide a water supply for the Contra Costa and Delta-Mendota Canals, and generate a great deal of hydroelectric energy. . ." (emphasis added) (357 US at 282; 2 Led 2d at 1320)

This Court then explained the nonreimbursable features of the CVP as follows:

> ". . .Moreover, the Federal Government will receive no reimbursement for that portion of the cost allocated to numerous aspects of the project, such as navigation, flood control, salinity prevention, fish and wild life preservation, and recreation. The irrigators will, therefore, be chargeable with but a small fraction of the total cost of the project. . ." (357 US at 283; 2 Led 2d at 1321)

situated in the southeastern corner of the Delta. The pumping plant is capable of diverting water at the rate of 4600 cubic feet per second. The water thus diverted is "exported" to its water contractors (primarily agricultural) in the southern portions of the San Joaquin Valley of California.

The other "export project" is the State Water Project. Its Delta Pumping Plant is also situated in the southeastern corner of the Delta. This pumping plant is presently capable of diverting water at the rate of 6300 cubic feet per second. The SWP intends to attempt to ultimately export and deliver 4.23 million acre feet of water out of the Delta to its water contractors (e.g., Kern County Water Agency, Metropolitan Water District of Southern California, Santa Clara Valley Water District, Tulare Lake Basin Water Storage District, petitioners herein).

Ultimately, both the SWP and CVP intend to attempt to divert and export at least 7.75 million acre feet of fresh water out of the Delta.[8] This is approximately 44 per cent of the present average annual Delta Outflow in a normal water year of 17.8 million acre feet.

In order to "capture" this enormous quantity of water and divert it out of the Delta (while ensuring the quality of such water for its water customers), the State of California proposes to construct the Peripheral Canal.

The Peripheral Canal Project

This would be a mammoth conduit of some 42 miles in length that would have its intake situated on the Sacramento River near the community of Hood. The Canal would divert 21,800 cubic feet per second of good quality water and convey it around the eastern edge of the Delta, thus isolating the water from the natural channels of the Delta. It would be so large (200 feet wide at the bottom, 400-500 feet wide at the top and 20-30

[8]See paragraph 3.57 of the "Pre-Trial Order" at p.98a of Joint Appendix.

feet deep) that it would be capable of diverting 70 to 80 per cent of the Sacramento River flows in a normal water year.[9]

The prime purpose of the Peripheral Canal is to enable the SWP to intercept and thus "grab" large additional amounts of excellent quality water which now flows into and through the Delta to provide the requisite "Salinity Control" needed for the protection of the multitude of beneficial water uses in this Estuarine System (particularly the uses within the Delta). As the District Court below found and concluded, such diversions would have a substantial impact on navigable capacity of the Sacramento River.[10]

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[9]These and other physical features and dimensions of the proposed Peripheral Canal are set forth in *Bulletin 76* (*1978*) at pp.85-89 thereof.

It should also be noted that the District Court below found that the Peripheral Canal would divert as much as 80% of the flow in the Sacramento River, viz: ". . . If constructed, the Peripheral Canal will divert waters from the Sacramento River near Hood, California. The rate of flow of water in the Sacramento River at that location varies between 10,000 cfs and 100,000 cfs. Donn J. Stafford, a civil engineer with the Department of Water Resources, testified that at various times during the year the Canal would divert significantly more than 50% of the Sacramento River flow and at times could divert as much as 80% of that flow." (400 F Supp at 632)

To understand the significant impact that diversions of 80% of Sacramento River flows would have upon the Delta, it should be noted that the Sacramento River supplies about 75% of the water flowing into the Delta. The San Joaquin River supplies only 10% of water into the Delta primarily because of the diversion and storage of its flows behind Friant Dam (at its headwaters). The result of the impoundment of San Joaquin River flows has been the degradation of water quality and diminished river flows in the Southern Delta.

[10]The District Court found:

> "With respect to the proposed operation of the Peripheral Canal, the evidence established that there would be significant effects on the velocity and water level of the Sacramento River." (400 F Supp at 632)

The District Court then concluded:

> ". . . The Court further concludes that as presently proposed, the Peripheral Canal will also result in an obstruc-

Salient Facts Re These Amici Curiae

Each of these *Amici* is a public water agency created by a special statute enacted by the California Legislature.[11] These public water agencies together with the San Francisco Bay Conservation and Development Commission [12] encompass practically all of the Bay-Delta Estuarine System.

One of the principal purposes of these *Amici* is that of preserving and protecting the water resources of the Delta and the quality thereof for the multitude of beneficial uses of water therein.

It should also be noted that the prevention of "salinity intrusion" is specifically authorized by statutes creating these public water agencies.[13]

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tion to navigable capacity of the Sacramento River." (400 F Supp at 632).

[11]Contra Costa County Water Agency was created by the "*Contra Costa County Water Agency Act*" in 1957 (*Stats. 1957, Chapter 518*).
San Joaquin County Flood Control and Water Conservation District was created by the "*San Joaquin County Flood Control and Water Conservation District Act*" in 1956 (*Stats. 1956, Chapter 46*).
Central Delta Water Agency was created by the "*Central Delta Water Agency Act*" in 1973 (*Stats. 1973, Chapter 1133.*)
South Delta Water Agency was created by the "*South Delta Water Agency Act*" in 1973 (*Stats. 1973, Chapter 1089.*)

[12]This Commission was created in 1965 to prepare a plan to protect and preserve the water resources and shoreline of San Francisco Bay. After the Commission submitted its plan to the Governor and to the Legislature in 1969, this 27 member Commission then became a permanent body to protect the Bay.

[13]For example, the "*Contra Costa County Water Agency Act*" provides in part:

> "§11. *Additional powers.* The agency may do any and every act necessary to be done so that sufficient water may be available for any present or future beneficial use or uses of the lands or inhabitants of the agency, including without limiting the generality of the foregoing, irrigation, domestic, fire protection, municipal, commercial, industrial and recreational uses. Without limiting the

Delta Protection Act (DPA)

Recognizing the vital importance of preserving and protecting this invaluable Delta and its manifold beneficial uses, the California Legislature enacted in 1959 a statute called the *"Delta Protection Act" (Stats. 1959, Chapter 1766)* (California Water Code Sections 12200 - 12205). The Legislature found that special legislation for the Delta was necessary because of the unique water problems therein; especially the problem of salinity intrusion.

Section 12202 of the DPA expressly obligates the SWP to provide "salinity control and an adequate water supply for the users of water in the Sacramento-San Joaquin Delta."

Section 12203 declares that no person or entity, private or public, "should divert water from the channels of the Sacramento – San Joaquin Delta to which the users within said Delta are entitled."

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generality of the foregoing or any other section of this act, the agency has the following additional powers:

* * *

(2) To develop, protect, conserve and reclaim waters, reduce the waste of water, *control and prevent the intrusion of salinity in water,* replenish underground water supplies and reclaim flood and storm waters, within the agency." (emphasis added in part)

Section 4.1 of the *"Central Delta Water Agency Act"* states its general purposes as follows:

"*§4.1. General purposes of agency*

The general purposes of the agency shall be to negotiate, enter into, execute, amend, administer, perform, and enforce one or more agreements with the United States and with the State of California, or with either, which have for their general purposes the following:

(a) *To protect the water supply of the lands within the agency against intrusion of ocean salinity*; and

(b) To assure the lands within the agency a dependable supply of water of suitable quality sufficient to meet present and future needs." (emphasis added in part.)

State Water Resources Control Board (SWRCB) and Its D-1485

The SWRCB is a political organization. Its five members are appointed by the Governor (Water Code Section 175). It does not have adjudicatory powers. Its function in connection with the processing of water appropriation applications is that of determining whether or not there is available "unappropriated water."[14]

Notwithstanding the aforementioned explicit mandate of the DPA, *State* (and its SWRCB) have promulgated wholly inadequate water quality standards for the alleged protection of the Delta in its Decision D-1485. *State* has touted D-1485 herein as a "landmark administrative decision." (*State Br., p. 6*) Said Decision D-1485 (and the companion documents submitted to this Court by *State*) show that the SWRCB slashed water quality standards in "dry" and "critical" years (when the need for Salinity Control is the greatest).[15] The significance of thus reducing

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[14]The functions of the SWRCB in a water appropriation proceeding are succinctly stated by the U.S. District Court in *Santa Margarita Mutual Water Company v. State Water Rights Board,* (D.C. - S.D. - Cal.) (1958) 165 F Supp 980, as follows:

> "However tried, the issues to be determined by the state agencies, are:
>
> (1) *was there available in the stream unappropriated water?*
>
> (2) what was the priority of the various applications?
>
> (3) which application should be granted and which denied?
>
> (4) to whom should permits issue?
>
> (5) *All this to be done without prejudice to existing vested rights, riparian,prescriptive, appropriative or otherwise.*" (emphasis added) (165 F Supp at 873)
>
> *Also:*
>
> "Thus, the state proceedings will concern solely the *appropriative claims to alleged excess water over and above vested rights.*" (165 F Supp at 879) (emphasis is Court's)

[15]See Decision D-1485, pages 37-39.

water quality standards in the Delta is that more water can thus be exported from the Delta by the SWP.[16]

As a result of the SWRCB's refusal to comply with the DPA in connection with its administrative decision in D-1485, these *Amici* had to and did file appropriate litigation in the State courts. These *Amici* are plaintiffs in 6 lawsuits (in the Superior Court of the City and County of San Francisco) which seek to annual and vitiate said D-1485.[17]

Water Right Status of State in Connection with the State Water Project

We desire to emphasize three things on this subject.

The first is that the *State* (and its Department of Water Resources - DWR) does not have any paramount or superior water right as the basis for the SWP and its "export" of water from the Delta. To the contrary, the *State* is merely a *junior appropriator*. Its water rights (through its water appropriation permits obtained from the SWRCB) are entirely subservient to the myriad of prior and superior water rights (e.g., riparian,

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[16]*State* explains this result as follows:

> "Under this decision, the SWP and CVP can export waters from the Delta to the extent these conditions are met." (*State Br.*, p. 6)

In other words, any water flow in excess of that needed to maintain a given water quality standard is thus subject to diversion and export.

[17]These lawsuits are the so-called *Delta Water Cases,* Judicial Council Coordination Proceeding No. 548 mentioned in the *State Br.* at p. 7. These lawsuits and their case numbers as filed are entitled: *"San Joaquin County Flood Control and Water Conservation District, Central Delta Water Agency, et al. v. SWRCB* (No. 743342, San Francisco); *South Delta Water Agency, et al. v. SWRCB* (No. 743341, San Francisco); *Contra Costa County Water Agency v. SWRCB* (No. 743385, San Francisco); *South Delta Water Agency, et al. v. SWRCB,* (No. 193342, Contra Costa); *San Joaquin County Flood Control and Water Conservation District, Central Delta Water Agency, et al. v. SWRCB* (No. 193377, Contra Costa) and *Contra Costa County Water Agency, et al. v. SWRCB* (No. 193298, Contra Costa).

prior appropriative, etc) in the Bay-Delta Estuarine System. In short, the *State* is supposed to only divert from the Delta *truly surplus water*. (Calif. Water Code Section 1202)

The second point is that the water contracts between the *State* and its water contractors (e.g., Kern County Water Agency, Metropolitan Water District of Southern California, et al) only obligate the *State* to deliver water to them if, as and when *surplus water* is available to the State for such deliveries. We stress this "surplus water phase" because it is easy to gain the impression from the briefs of the *State* and its rich and powerful allies (the petitioners Kern County Water Agency and Metropolitan Water District, et al herein) that these water contractors have a fixed and legal right to receive at all times the amounts of water specified in the SWP contracts. This is not so.[18]

The third and most important aspect of this water right situation is that the *State* (DWR) *has a direct "conflict of interest"* vis-a-vis the Delta and its superior water rights. Why? Because as a junior appropriator (and as the operator of the SWP) the *State* is desirous of exporting as much water from the Delta as possible for delivery to its customers under the SWP contracts. An axiom of water law is that there is always a direct "conflict of interest" between a junior appropriator and a senior water right owner unless there is a clear, binding and readily enforceable "diversion schedule" binding upon both of them. No such adjudicated schedule exists in this Delta situation.

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[18]These facts as to the SWP contracts are contained in *Bulletin 141* published by the *State* and entitled: "The California State Water Project - Water Supply Contracts" (November 1965). It should be mentioned that each SWP contract is virtually identical as to its terms because certain "Standard Provisions for Water Supply Contract" were approved by Governor Brown on August 3, 1962 which established the basis for these SWP contracts. We adopt the procedure of the *State* herein in asking this Court to take judicial notice of this official governmental publication. One two-volume set is being lodged with the Clerk of this Court.

This basic conflict is expressly confirmed by the following cryptic statement in the *State Br.:*

> "The more water that is used for flushing purposes, however, the less water is available for export to the contracting water districts. A conflict thus exists between Delta water needs and the water needs of users in central and southern California." (p. 5)

It should be emphasized at this juncture that one of the principal duties of the *State* (DWR) and the function of its SWP is that of providing adequate Salinity Control in and for the Delta and to provide an adequate water supply for the users therein (pursuant to the mandates of the *Delta Protection Act*) (p.11, *supra*).

We respectfully submit that these facts above as to the Delta's unique situation demonstrate the wisdom of not permitting the *State* to take control of the navigable waterways in the Delta.

ARGUMENT

I-THE ARMY CORPS OF ENGINEERS HAS FULL JURISDICTION UNDER THE RIVERS AND HARBORS ACT OF 1899 OVER SAID "EXPORT DIVERSIONS" (SWP)

A. Settled Legal Principles

The Commerce clause of the U.S. Constitution, Article I, Section 8, Clause 3, grants to the federal government broad powers to regulate all activities affecting interstate commerce in navigable waters. This power to regulate commerce necessarily includes the power over navigation. [*Gibbons v. Ogden,* 22 US (9 Wheat) 1, 6 L Ed 23 (1824)] Thus the federal government has the duty of protecting navigable waters as the public property of the nation. [*Wyandotte Transportation Co. v. U.S.,* 389 US 191, 201, 19 Led 2d 407 (1967); *Gilman v. Philadelphia,* 70 US (3 Wall) 713, 724-725, 18 L Ed 96 (1865)]. It is indisputable that the Rivers and Harbors Act is a proper exercise of power by the

Congress of the United States under its duty to protect the navigable waters of the United States.

It is also beyond cavil that the federal power to regulate interstate commerce and navigable waters extends beyond navigation per se, and may include consideration of social, economic, aesthetic and ecological factors. [*Kaiser Aetna v. U.S.* ____ US ____, 62 Led 2d 332, 100 S Ct 383 (1979); *U.S. v. Appalachian Electric Power Co.*, 311 U S 377, 85 Led 2d 243, 61 S Ct 291 (1940); *Zabel v. Tabb*, 430 F2d 199 (5th Cir. 1970)] In fact, *State* concedes that the Corps' authority under the Rivers and Harbors Act is very broad. (*State Br.*, pp. 45-47).

B. Application of Said Settled Principles to Instant Case

Two things should be emphasized in this connection.

The first is that the parties stipulated below that various natural channels in the Delta constitute "navigable waters of the United States within the meaning of the Rivers and Harbors Act of 1899."[19]

The second salient fact pertinent on this phase is that the parties also stipulated in and by the aforementioned "Pre-Trial

[19]Said "Pre-Trial Order" (in paragraph 3.42) states as follows:

> "3.42 For purposes of this action, it is stipulated that the following constitute navigable waters of the United States within the meaning of the Rivers and Harbors Act of 1899: the Sacramento River to River Mile 301.6, at Keswick Dam; the San Joaquin River to River Mile 118, at the confluence of the Merced and San Joaquin River; and the Sacramento-San Joaquin River Delta including but not limited to Old River, Middle River, Italian Slough, Whiskey Slough, Beaver Slough, Disappointment Slough, Fourteen Mile Slough, Victoria Canal, North Victoria Canal, North Canal and Woodwood Canal to the plane of the mean higher-high tide. For purposes of this lawsuit it is agreed that the portion of the Delta from which water is drawn by facilities of the Tracy Pumping Plant is a 'navigable river or other navigable water of the United States' within the meaning of section 9 of the Rivers and Harbors Act of 1899." (Joint Appendix, p. 96a)

Order" that the Peripheral Canal would result in the closure, modification or temporary modification of various Delta waterways.[20] We will deal with the Peripheral Canal more fully hereafter (p. 23, *infra*).

The third salient fact is that the District Court in its analysis of the need for a compliance by the *State* (DWR) with Section 10 of the Rivers and Harbors Act, found that the Peripheral Canal would result in the complete closure or substantial modification of various navigable channels in the Delta and also would have a substantial impact upon the velocities and water levels in these channels.[21]

What then is the position of the *State* with respect to the foregoing salient and undisputed facts which clearly confirm the jurisdiction of the Corps herein? This issue is framed (at p. 15 of the *State Br.*) as follows:

> "The primary question here is whether section 10 applies to water diversions authorized under the water rights laws of the western states."

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[20]Paragraph 3.55 of said "Pre-Trial Order" states:

> "3.55 The Peripheral Canal would result in the closure, modification or temporary modification of the following Delta channels: Sacramento River; Snodgrass Slough; Lost Slough; Mokelumne River; Beaver Slough and Beaver Canal; Hog Slough; Sycamore Slough and Sycamore Canal; White Slough and White Canal, and outlet into Disappointment Slough; Telephone Cut; Disappointment Slough, Fourteen Mile Slough and Fourteen Mile Canal; San Joaquin River; Whiskey Slough; Middle River Complex; Old River; and West Canal." (Joint Appendix, p. 97a)

[21]The District Court stated (in part):

> ". . . It also appeared that diversion would decrease the velocity and lower the water level of the Sacramento River downstream from the Peripheral Canal intake. Finally, the Canal would result in the closure or modification of a number of rivers and sloughs in the Delta including the complete damming of the Middle River. With respect to the Middle River closure, no provision has been made for the passage of boats past this point on the River." (400 F Supp at 632.)

The *State's* principal contention on this phase is, in essence, that the Rivers and Harbors Act should be construed as not applying to the aforementioned exports from the Delta by the SWP (and CVP) because of an alleged "historic congressional policy of deferring to state water rights laws governing water allocations in the western states" (*State Br.*, p. 14, et. seq.)

1. The Rivers and Harbors Act Does Not Exempt Water Export Projects (e.g., SWP and CVP) from the Corps' Permit Jurisdiction under Sections 9 and 10.

On its face, Section 9 of the Act does not contain any express exemption of water export projects from the scope of its applicability to activities in navigable waterways. On its face, Section 10 of the Act similarly does not contain any such express exemption of water export projects. Thus, the only way that *State* can evade the requirement of *applying for a permit under Sections 9 and 10 of the Act* is by demonstrating that Congress impliedly exempted the water export operations from the Act. No such implied Congressional exemption has been demonstrated in the brief of *State* or any other brief filed herein.

2. Neither *California* v. *US* nor *U.S.* v. *New Mexico* Support An Exemption Of Water Export Projects.

One of the principal authorities relied upon by *State* in support of its argument is *California v. United States,* 438 US 645 (1978). That decision of this Court does not support the *State's* position herein. That case is clearly distinguishable from the instant case, both factually and legally. In that case, this Court was called upon to interpret Section 8 of the federal Reclamation Act of 1902, which, in essence, required that the Secretary of Interior, in connection with reclamation projects constructed by the federal government, "shall proceed in conformity with state laws relating to the control, appropriation, use or distribution of water." This Court in that case decided (by a divided vote)

that under these provisions (of Section 8) the state water authority has the right and power, in considering and acting upon an application by the U.S. Bureau of Reclamation (now Water and Power Resources Service) to incorporate "terms and conditions" in any water permit granted by such state water authority to the federal agency.

The situation in the instant case is entirely different from that in *California v. United States.* We are dealing herein with *a federal statute* (Rivers and Harbors Act of 1899), which is conceded to be paramount to state law and which confers paramount jurisdiction on navigable waterways upon the Corps. There is no express deference to state water law in the Rivers and Harbors Act (as found by this Court in Section 8 of the Reclamation Act).

It should also be noted that this Court limited the right of the *State* to exclusively control its waters to situations where the reserved rights or navigation servitude of the United States are not invoked. This Court turned to its previous decisions in *United States v. Rio Grande Dam & Irrigation Co.,* 174 US 690 (1899) and stated as follows:

> "The Court noted that there are two limitations to the States' exclusive control of its streams—reserved rights 'so far as least as may be necessary for the beneficial uses of the government property,' 174 US, at 703, and the navigation servitude. The Court, however, was careful to emphasize with respect to these limitations on the States' power that, *except where the reserved rights or navigation servitude of the United States are invoked,* the State has total authority over its internal waters." (emphasis added.) (438 US at 662; 57 Led 2d at 1030)

Nor does this Court's decision in *United States v. New Mexico,* 438 US 696 (1978) aid *State* herein. That case involved the question of federal reserved rights to water in the Rio Mimbres River to preserve timber and provide water flows in the Gila National Forest. Speaking to the subject of when federal interest in

water defers to state water law, this Court clarified its holding in *California v. United States* by limiting such deference to state water law to situations where "Congress has expressly addressed the question of whether federal entities must abide by state water law."

This Court stated:

> *"Where Congress has expressly addressed the question* of whether federal entities must abide by state water law, it has almost invariably deferred to the state law. See California v. United States, ante, at 653-670, 678-679, 57 L Ed 2d 1018, 98 S Ct 2985. Where water is necessary to fulfill the very purposes for which a federal reservation was created, *it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water.* Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator." (Emphasis added.) (438 US at 702; 57 L ed 2d at 1058.)

From the foregoing, it is obvious, we respectfully submit, that the "historic Congressional policy of deference to state water law" should be limited to statutes wherein Congress has expressly spoken in favor thereof. Congress declined to do so in the Rivers and Harbors Act of 1899. The *State's* position must be rejected.

3. The Corps Does Not Attempt To "Allocate" Water When Exercising Its Powers to Protect the Public Interest in the Condition and Quality of Navigable Waters

There are four points we desire to make on this phase.

The first point is that when the Corps exercises its powers and performs its duties under the Rivers and Harbors Act and concludes that the activities of an applicant for a permit injure navigable waterways, the Corps may deny the permit or grant a permit subject to terms, conditions and limitations. In doing so, the Corps is not attempting to "allocate" water between competing water right owners (e.g., between owners of senior and superior water rights in the Delta and the *State* (DWR) as a junior appropriator). The Corps thus acts only to carry out and implement the paramount federal interest in protecting navigable waters. Therefore, the actions of the Corps taken pursuant to such paramount powers should not and cannot properly be characterized as an attempt to adjudicate the water rights (or to "allocate water" in the water-right sense) between a senior and superior water right owner and an applicant for a junior water appropriation permit (as the *State* argues herein).

The second point is that if the Corps concludes, after processing an application for a permit to cover the "export diversions" of the SWP, that certain water flows are needed in the Delta to protect these navigable waters and that therefore the SWP cannot export such requisite water flows, the *State* (DWR) has no cause to complain. Why? Because such requisite flows would not constitute "surplus water" available for such "export diversions." This "surplus water" requirement (California Water Code Section 1202) should be kept uppermost in mind if the proceedings and actions of the Corps under the Rivers and Harbors Act can properly and fairly be characterized as a water-

right matter or proceeding (which *Amici* submit is an improper characterization of the Corps' role and powers exercised under said Act).

The third point is that, under the facts of this case, no application by the *State* under said Act for its SWP has been processed by the Corps. Thus, it is premature and wholly speculative to conclude that the Corps has failed or would fail to properly "allocate" the water flows of the Delta. In other words, there can be no Corps determination that the "export diversions" of the SWP must be stopped or restricted in order to protect the navigable waters of the Delta (and the rest of the Bay-Delta Estuarine System) until the *State* (DWR) complies with the Rivers and Harbors Act by filing its application for a permit under Sections 9 and 10.

The fourth point is that, under the facts of this case, the salinity intrusions into the Delta caused by the "export diversions" out of the Delta by the *State* (DWR) and its SWP (with the resultant degradation of water quality for all beneficial uses of water in the Delta) constitutes a species of "pollution" which is forbidden by the provisions of the federal Clean Water Act (33 USC Sections 1251, et seq.). This is confirmed by the terms of the Clean Water Act and the legislative history in connection therewith.[22]

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[22]Section 1362(19) of Title 33 of the U.S. Code defines "pollution" as follows:

> "19) the term 'pollution' means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water."

This definition of "pollution" was the specific subject of a dialogue between Senator Muskie and Senator Bayh (on October 4, 1972) on the floor of the United States Senate, viz:

> "MR. BAYH: Mr. President, I wish to direct a question to the distinguished Senator from Maine (MR. MUSKIE) concerning the definition of water pollution in section 502 of this bill. *As we are all aware, the problem of excessive, ocean-derived salt water intrusion is a matter of the most*

II-THE RULING OF THE DISTRICT COURT BELOW WITH RESPECT TO THE PERIPHERAL CANAL PROJECT SHOULD NOT BE DISTURBED NOR CLOUDED BY A DECISION HEREIN.

The District Court below [*Sierra Club v. Morton*, 400 F Supp 610, N.D.Cal. (1975)] found that construction of the

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serious concern as it affects the estuaries, tidal marshlands and other water bodies of our country.

Under section 208(b)(2)(I) of the bill, areawide waste treatment plans must contain a process to identify this salt water intrusion and procedures and methods to control such intrusion to the extent feasible.

My question to the distinguished Senator is whether such salt water intrusion is pollution within the definition contained in section 502 of the bill?

MR. MUSKIE: I am happy to reply to the Senator. Such salt water intrusion to which the Senator refers resulting from reduction of fresh water flows from any cause, including irrigation, obstruction, upstream storage, ground water extraction and diversions, is no less a problem in various areas of the country than many of the other serious pollutants which threaten our fresh water supplies. As was noted in the report of the Senate Committee on Public Works last October:

'*Salt water intrusion, no less than point sources of discharge, alters significantly the character of the water and the life system it supports. Salt water intrusion often devastates the commercial shellfish industry. It must be accounted for and controlled in any pollution control program.* It makes no sense to control salts associated with industrial or municipal point sources and allow, at the same time, similar effects to enter the fresh water as a result of intrusion of salt water. The bill requires identification of those causes and establishment of methods to control them so as to minimize the impact of salt water intrusion.'

That language is as valid today as it was last year. For that reason, in answer to the Senator's question, *I would state that it is the intent of the conferees and of the bill that such salt water intrusion is pollution as defined in section 502 of the bill.*" (emphasis added) (118 Congressional Record, p. 16894)

Peripheral Canal would result in the complete damming of Middle River which is a navigable waterway in the Delta. The Court found that the Peripheral Canal would be a "dike" within the meaning of Section 9. The Court concluded that Section 9 of the Rivers and Harbors Act applies to the Peripheral Canal Project and that an appropriate permit must be obtained before it is constructed. The Court stated:

> "With respect to the Peripheral Canal, it is clear that Section 9 authorization will be required before any party commences building the Canal as it is presently proposed. At the point where the Canal crosses the Middle River, the Canal will result in the complete damming of the river. Furthermore, there is presently no provision for the passage of boats past the Canal at this location. Such a closure of the Middle River will constitute the building of a "dike" within the meaning of Section 9." (400 F Supp 610 at 626.)

The District Court further found that the Peripheral Canal would have significant and substantial effects on the velocity and water level of the Sacramento River. It further found that the Canal would result in the closure or modification of a number of navigable channels in the Delta, including the damming of Middle River. (400 F Supp at 632)[23]

The District then concluded that Section 10 was also applicable to the Peripheral Canal Project, viz:

> "Accordingly, the Court concludes that the operation of the Tracy and Delta Plants presently obstructs the navigable capacity of various navigable waters in the

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[23]As hereinbefore noted, the parties herein stipulated in and by the "Pre-Trial Order" set forth in the Joint Appendix filed herein that Peripheral Canal would result in the closure, modification or temporary modification" of a number of Delta channels. (See paragraph 3.55 of "Pre-Trial Order" at page 97a of Joint Appendix).

> Delta. The Court further concludes that as presently proposed, the Peripheral Canal will also result in an obstruction to navigable capacity of the Sacramento River." (400 F Supp at 632)

On appeal to the Circuit Court, the Court of Appeals (in *Sierra Club v. Andrus,* 610 F2d 581 (9th Cir., 1979) reh. den. 1980) was not asked to review any of the District Court's findings with respect to the Peripheral Canal.[24] The Court of Appeals noted this in its opinion as follows:

> "Neither the federal nor the state parties challenge the District Court's ruling concerning the Peripheral Canal." (611 F2d at 585)

We also wish to note that petitioners Kern County Water Agency and Metropolitan Water District of Southern California, et al specifically stated in their Petition for Writ of Certiorari (at page 5) that the Peripheral Canal is not the subject of their Petition, viz:

> "The State of California is planning to modify its present Delta diversion operations by building a canal known as the Peripheral Canal. However, that facility is not the subject of this petition (App. pp.71, 72)."

Based upon the foregoing, it should be apparent that the subject of the Peripheral Canal is not before this Court. In other words, the applicability of Sections 9 and 10 to the Peripheral Canal Project is not an issue in these proceedings.

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[24]The District Court also noted in its opinion, in footnote 34 thereof, that there was a concession during the course of trial that Sections 9 and 10 apply to the Peripheral Canal Project, viz:

> "34. With respect to the Peripheral Canal, it is conceded that its construction will require authorization under Sections 9 and 10 of the Rivers and Harbors Act of 1899. For the reasons set forth herein, a permit under Section 10 will likewise be required for its operation." (400 F Supp at 633).

Amici would normally feel comfortable with the foregoing facts in this proceeding and rest upon our conclusion that the Peripheral Canal is not before this Court. However, we fear that the Court could lose sight of the facts herein as to the Peripheral Canal given the broad reach of the contentions and arguments made by *State* herein. *State* seeks to totally exempt all State operated water projects and state authorized water diversions from the scope of Sections 9 and 10. For example, *State* further argues (as its Point II) that:

> **"I. IN LIGHT OF THE HISTORIC CONGRESSIONAL POLICY OF DEFERRING TO STATE WATER RIGHTS LAWS GOVERNING WATER ALLOCATIONS IN THE WESTERN STATES, *SECTION 9 AND 10 OF THE RIVERS AND HARBORS ACT OF 1899 SHOULD BE CONSTRUED AS NOT AFFECTING SUCH ALLOCATIONS*, . . ."** (emphasis added) (*State Br.*, p. 14)

> **"II. THE RIVERS AND HARBORS ACT OF 1899 DOES NOT APPLY FULLY, IF AT ALL, TO DIVERSION WORKS OWNED AND OPERATED BY THE STATES."** (*State Br.*, p. 48)

In arguing these points, *State* does not exclude the Peripheral Canal from the broad scope of their arguments in these proceedings.

Amici respectfully request that if the Court concludes and decides there is merit in the *State's* position herein that appropriate language be incorporated in any such a decision so that the ruling of the District Court on the Peripheral Canal Project is not disturbed nor clouded thereby.[24]

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[25]In making this request, this Court should be aware that the California Legislature authorized the Peripheral Canal Project during this past year by its passage of Senate Bill 200. Governor Brown signed the bill in late July, 1980. Less than 90 days thereafter, petitions with the signatures of over 843,000 California voters were submitted to the Office of the Secretary of State which qualified a referendum

Before concluding. *Amici* wish to add that while we have confined our arguments herein to the question and issues involving the applicability of the Rivers and Harbors Act to the water diversion activities of the "Delta Export Projects", we support the Sierra Club on the other issue herein, to-wit: the existence of a private right of action to enforce the Rivers and Harbors Act. The brief of the Sierra Club masterfully details the applicable legislative and common law history on this subject of the existence of a private right of action. We adopt their brief on this subject.

CONCLUSION

The Court of Appeals was correct in its conclusion that a private right of action exists to enforce the Rivers and Harbors Act of 1899. It was also correct in concluding that said federal statute applies to and prohibits the unauthorized water diversion of the *State* and its SWP in this case. Accordingly, *Amici* urge the affirmance of the judgment of the Court of Appeals.

Dated: December 30, 1980

Respectfully submitted,

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measure on the ballot at the next General Election. This referendum will be voted upon by the People in 1982 unless the Governor calls a special election to be held at an earlier date.

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